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No. 90-79

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In The

Supreme Court of the United States

October Term 1990

RICHARD B. KAY,

Petitioner,

vs.

BREMER EHRLER, and THE KENTUCKY BOARD of ELECTIONS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ALABAMA, ALASKA, ARKANSAS, DELAWARE, FLORIDA, IDAHO, INDIANA, IOWA, KANSAS, MICHIGAN, MISSOURI, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, PENNSYLVANIA, SOUTH CAROLINA, UTAH, VERMONT, VIRGINIA, AND WYOMING IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 2

ARGUMENT 2

A. Plaintiff has No Standing to Claim Attorney's Fees As a *Pro Se* Attorney Plaintiff Because the Record Does Not Establish That He Was Licensed to Practice Law in Kentucky 2

B. A *Pro Se* Attorney Plaintiff Is Not Entitled to Attorney's Fees Under 42 U.S.C. § 1988 3

1. The Plain Language of the Statute Disallows Fees 3

2. The Legislative History and Purposes Behind the Statute Demand That Fees Not Be Awarded To A *Pro Se* Attorney 5

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES:

Bender v. Williamsport Area School District, 475 U.S. 534 (1986) 3

Blanchard v. Bergeron, 489 U.S. 87 (1989) 9

Blum v. Stenson, 465 U.S. 886 (1984) 4, 7, 8

Cazalas v. United States Department of Justice, 709 F.2d 1051 (5th Cir. 1983) 8

Cofield v. City of Atlanta, 648 F.2d 986 (5th Cir. 1981) 7

Davis v. Parratt, 608 F.2d 717 (8th Cir. 1979) 3, 4, 7

Duncan v. Poythress, 777 F.2d 1508 (11th Cir. 1985) 4

Ex Parte Young, 209 U.S. 123 (1908) 2

Falcone v. I.R.S., 714 F.2d 646 (6th Cir. 1983) 8, 9

Gonzalez v. Kangas, 814 F.2d 1411 (9th Cir. 1987) 6

King Bridge Co. v. Otoe County, 120 U.S. 225 (1887) 3

Lawrence v. Staats, 586 F.Supp. 1375 (D.D.C. 1984) ... 4, 6

O'Connell v. Zimmerman, 321 P.2d 161 (Cal. Dist. Ct. App. 1958) 4

Pitts v. Vaughn, 679 F.2d 311 (3d Cir. 1982) 10

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) 3

Turman v. Tuttle, 711 F.2d 148 (10th Cir. 1983) 7

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

42 U.S.C. §§ 1981, 1982, 1983, 1985 & 1986 2

42 U.S.C. § 1988 ..... *passim*

Title IX of Public Law 92-318 2

Title VI of the Civil Rights Act of 1964 2

MISCELLANEOUS:

ABA Model Code of Professional Responsibility (1980) 10

S. Rep. No. 94-1011, 94th Cong., 2d Sess 2, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908 ..... *passim*

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The amici States enumerated above, by their respective Attorneys General, submit this brief in support of affirmance of the judgment of the United States Court of Appeals for the Sixth Circuit entered in the proceeding below on April 13, 1990.

INTEREST OF AMICI CURIAE

The amici States, like all States, employ officials who are potentially subject to suits under 42 U.S.C. §§ 1981, 1982, 1983, 1985 & 1986, title IX of Public Law 92-318 and title VI of the Civil Rights Act of 1964, *see, e.g., Ex Parte Young*, 209 U.S. 123 (1908), and thus are subject to potential liability for payment of "reasonable attorney's fees as part of the costs" to "prevailing part[ies]" under 42 U.S.C. § 1988. They thus have a vital and ongoing interest in seeing that the judgment below, denying attorney's fees to a *pro se* attorney plaintiff who prevailed in his civil rights case, is affirmed. The States have the obvious interest in protecting their treasury from the potentially devastating costs of paying opposing parties' attorney's fees.

ARGUMENT

A. Plaintiff has No Standing to Claim Attorney's Fees as a *Pro Se* Attorney Plaintiff Because the Record Does Not Establish That He Was Licensed to Practice Law in Kentucky.

The plaintiff brought his suit in the United States District Court for the Eastern District of Kentucky. Although the record indicates that plaintiff is licensed to practice law in the state of Florida, the record does not in any way suggest, let alone establish, that plaintiff was licensed to practice before the United States District Court for the Eastern District of Kentucky. This Court has ruled that "the existence of a justiciable 'case' or 'controversy' under Article III, must affirmatively appear in the

record. As the first Justice Harlan observed, 'the presumption . . . is that the court below was without jurisdiction' unless 'the contrary appears affirmatively from the record.' " *Bender v. Williamsport Area School District*, 475 U.S. 534, 546 (1986) (quoting *King Bridge Co. v. Otoe County*, 120 U.S. 225, 226 (1887)) (footnote omitted); see also *Bender*, 475 U.S. at 550 (Marshall, J., concurring).

Because plaintiff has therefore failed to establish that he was a licensed attorney before the federal district court, he had no standing to argue before either the federal district court or the United States Court of Appeals that a *pro se attorney* plaintiff is entitled to attorney's fees under § 1988. A favorable decision on his claim that a *pro se attorney* plaintiff is entitled to attorney fees would not remedy his injury. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). He only has standing to argue that a *pro se non-attorney* plaintiff is entitled to attorney's fees.

B. A *Pro Se* Attorney Plaintiff Is Not Entitled to Attorney's Fees Under 42 U.S.C. § 1988.

1. The Plain Language of the Statute Disallows Fees.

42 U.S.C. § 1988 gives the court discretion to award "a reasonable attorney's fee as part of the costs." It is beyond dispute that when an attorney represents himself or herself there are no attorney's fees at all. No attorney's fees are charged and none are paid, for there simply is no attorney-client relationship. *Cf. Davis v. Parratt*, 608 F.2d 717, 718 (8th Cir. 1979) (Section 1988 "presupposes a relationship of attorney and client that is lacking in the

instant case."); *Duncan v. Poythress*, 777 F.2d 1508, 1517-19 (Roney, J., dissenting) (attorney's fees should not be allowed to a pro se "attorney" because there is no actual "attorney" as the word "attorney" is defined in any dictionary in terms of someone who acts *for another*, a situation that does not exist where an attorney represents himself).[1] Consequently, under the plain language of the statute, a *pro se* attorney plaintiff cannot be awarded attorney's fees because there was no attorney-client relationship and there were no attorney's fees incurred. *See Davis; see also O'Connell v. Zimmerman*, 321 P.2d 161, 165 (Cal. Dist. Ct. App. 1958) (State statute allowing recovery of "reasonable attorney fees incurred" does not authorize payment to a *pro se* attorney because "he has paid no fee nor has he incurred any liability to pay an attorney fee.").

Furthermore, 42 U.S.C. § 1988 provides for attorney's fees "as part of the costs." This modifying language reinforces the notion that an award of fees is only appropriate where attorney's fees have actually been incurred. *See Lawrence v. Staats*, 586 F. Supp. 1375, 1379 n. 4 (D.D.C. 1984). The *pro se* attorney may have to pay court costs and other costs incurred in connection with his or her lawsuit, but attorney's fees are surely not paid as part of the costs. To stretch the term "costs" to include "opportunity costs" would amount to unwarranted judicial legislation contradicting the plain meaning of the word "costs." Had

[1] It is this lack of an attorney-client relationship that makes petitioner's reliance on *Blum v. Stenson*, 465 U.S. 886 (1984), inapposite. In *Blum*, the prevailing party was represented by Legal Aid Society attorneys and thus there was clearly an attorney-client relationship.

Congress intended to include "opportunity costs" within the meaning of Section 1988, it surely would have used language that more specifically addressed the matter.

2. The Legislative History and Purposes Behind the Statute Demand That Fees Not Be Awarded To a *Pro Se* Attorney.

The Senate Report on the Civil Rights Attorney's Fees Award Act of 1976 states:

> All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.
>
> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 94-1011, 94th Cong., 2d Sess 2, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5910.

Not only does the plain language of the statute reject the awarding of attorney's fees to *pro se* attorney plaintiffs as discussed above, but equally importantly, it is completely unnecessary for a *pro se* attorney plaintiff to receive an award of attorney's fees in order to ensure that citizens have a "meaningful opportunity to vindicate [their civil rights]."

The most obvious reason is that unlike a non-attorney who must hire and pay an attorney to pursue his or her civil rights claim, the *pro se* attorney does not have to hire or pay anyone to pursue his or her claim. There is no financial burden of legal fees deterring or preventing the *pro se* attorney from pursuing his or her claim. See *Lawrence v. Staats*, 586 F.Supp. at 1379. Denying the *pro se* attorney a surplus award of "attorney's fees" does not impinge on the attorney's ability to pursue his or her claim. By representing himself or herself, the *pro se* attorney has a "meaningful opportunity" to vindicate his or her rights.

Although it can be argued that the *pro se* attorney does incur the opportunity costs of having to give up other legal work while he or she pursues his or her own civil rights claim, this opportunity cost exists for *pro se non-attorneys* as well. For the carpenter and doctor who proceed *pro se* must also give up fees from their respective businesses to pursue their claims, too. And yet the circuit courts are unanimous in denying attorney's fees to *pro se* non-attorneys. *See, e.g., Gonzalez v. Kangas*, 814 F.2d 1411 (9th Cir. 1987) (and cases cited therein). If it is not necessary to award fees to *pro se* non-attorneys to cover their opportunity costs to provide them with a meaningful opportunity to vindicate their rights, then it is equally unnecessary to award fees to *pro se* attorneys to allow them to vindicate their rights. *See Lawrence v. Staats*, 586 F.Supp. at 1379 (finding "no reason to draw a distinction between *pro se* non-attorneys, who cannot recover fees, and *pro se* litigants who are attorneys.").

Furthermore, it is fundamentally illogical to award attorney's fees for opportunity costs. Opportunity costs

reflect not the value of legal services provided, but the value of the services that are given up to pursue the civil rights claim. The statute provides for fees for the former and not the latter. *See Blum v. Stenson*, 465 U.S. 886, 892 & 895 (1984) (fees under section 1988 are to be calculated according to prevailing market rates and not according to the cost of providing the services). Thus, awarding opportunity costs would violate this Court's ruling in *Blum*.

To award market rate fees, however, could yield windfalls. To illustrate, the *pro se* attorney in pursuing his own civil rights claim may have to forego, say, 50 hours of time he would otherwise spend on very low-paying legal work that would generate only, say, $25 per hour, whereas the legal work he does on his civil rights claim may have a market rate of, say, $100 per hour. An award of $1250 would compensate the attorney for his lost time and would thus be adequate to prevent his being deterred from bringing or unable to bring his civil rights suit. But under Section 1988, an award of "reasonable attorney's fees" would mean the *pro se* attorney would get $5000. *See Blum*. The attorney would thus get a windfall of $3750, a bonus not intended by Congress. *See* S. Rep. No. 94-1011, supra, at 5913 (The fees should be "adequate to attract competent counsel, but which do not produce windfalls to attorneys."); *Cofield v. City of Atlanta*, 648 F.2d 986, 988 (5th Cir. 1981) ("the purpose of section 1988 is not to compensate a worthy advocate but to enable and encourage a wronged person to retain a lawyer"); *see also Davis v. Parratt*, 608 F.2d 717, 718 (8th Cir. 1979); *Turman v. Tuttle*, 711 F.2d 148, 149 (10th Cir. 1983).

Only by confining fee awards to only those parties who actually retain an attorney can an inappropriate windfall be avoided. Although an award of fees equal to actual opportunity costs could avoid windfalls, such an award would be wholly unjustified in terms of the plain language of the statute and *Blum's* determination that one receives the market value of the services provided, not the cost of providing that service. *See Blum*, 465 U.S. at 892 & 895. Finally, such an award would impose an extremely difficult problem of proof. *See Falcone v. I.R.S.*, 714 F.2d 646, 648 (6th Cir. 1983). How would one calculate the value of the work the lawyer gave up? Did the lawyer have a full load of work such that time spent on his or her civil rights action actually took away from productive attorney time?

Contrary to the argument made by some courts that it would be "relatively simple to value [the opportunity lost] where the pro se litigant is an attorney, for the work foregone is of the same nature as that actually performed," *Cazalas v. United States Department of Justice*, 709 F.2d 1051, 1057 (5th Cir. 1983), the value of the work foregone is very difficult to calculate simply because it is never clear exactly what work was foregone. Moreover, the legal work foregone may not at all be of the same nature as the work actually performed, for a patent attorney's work differs greatly from a civil rights claim.

The Senate Report's reference to the fact that in "many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer," further supports not awarding *pro se* lawyers attorney's fees. The *pro se* attorney does not need any money to hire a lawyer for he or

she handles the legal matter on his or her own and incurs no liability for fees.

Congress' purpose in enacting § 1988 of enabling civil rights litigants to obtain competent counsel, *see Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989), is not served by granting fees to a *pro se* attorney. The attorney plaintiff is not going to forego professional representation because he would not be awarded fees for representing himself, but may simply choose to hire outside counsel.

Finally, to the extent an attorney must bear a large opportunity cost in handling his or her own case, the non-payment of fees would not deter her from bringing her civil rights action *at all*, but would only at best encourage her to hire an outside attorney to bring the suit. Thus, the Act's goal of providing citizens with a "meaningful opportunity" to vindicate important rights would not be compromised in the least by refusing to award attorney's fees to *pro se* attorneys. The attorney could choose to simply hire an outside attorney to handle her case knowing full well that if they prevail they will be entitled to reasonable attorney's fees.

Moreover, encouraging an attorney to hire an outside attorney as opposed to representing herself *pro se* actually furthers one of the purposes behind the Act. One of the purposes behind the fee provision is to encourage the hiring of competent counsel, *see* S. Rep. No. 94-1011, *supra* at 5913, which has the additional benefit of screening out unnecessary and unwarranted litigation. *See Falcone v. I.R.S.*, 714 F.2d 646, 647 (6th Cir. 1983). An attorney who represents himself may not have the "objectivity and

detachment that an outside attorney can provide as a check against groundless or unnecessary litigation." *Pitts v. Vaughn*, 679 F.2d 311, 313 (3d Cir. 1982).

Finally, the hiring of outside counsel avoids the problems that arise when an attorney serves as an advocate and as a witness in the same case, a situation likely to arise when the lawyer is a plaintiff in a civil rights action. The ABA Model Code of Professional Responsibility (1980) states:

> EC 5-9 Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the case of another, while that of a witness is to state facts objectively.

Thus, denying attorney's fees to *pro se* attorneys would serve to encourage attorney plaintiffs to hire outside counsel and would thereby promote more effective litigation.

In sum, because the plain language of Section 1988 does not provide for attorney's fees to pro se attorneys, and denial of fees would not only not deprive civil rights litigants of a "meaningful opportunity" to vindicate their rights, but would actually promote more effective litigation, this Court should conclude that Section 1988 does

not allow the award of attorney's fees to *pro se* attorney plaintiffs.

CONCLUSION

For the foregoing reasons, we respectfully request that this court affirm the judgment of the Court of Appeals.

Dated: Honolulu, Hawaii, December 19, 1990

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